

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

HONORABLE ANDREW J. GUILFORD, JUDGE PRESIDING

REPORTER'S TRANSCRIPT OF PROCEEDINGS

MOTION HEARING

SANTA ANA, CALIFORNIA

THURSDAY, MARCH 1, 2018

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1 SANTA ANA, CALIFORNIA; THURSDAY, MARCH 1, 2018; 10:00 A.M.

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3
4 THE CLERK: Item one, SACV17-00126-AG, Courthouse
5 News Service versus David Yamasaki.

6 THE COURT: Let's have appearances, please.

7 MR. AMBERG: Good morning, Your Honor.

8 John Amberg from Bryan Cave on behalf of the
9 plaintiff Courthouse News Service.

10 MR. NAEVE: Good morning, Your Honor.

11 Robert Naeve and Cary Sullivan on behalf of
12 defendant Yamasaki and the Orange County Superior Court.

13 THE COURT: Well --

14 MR. NAEVE: May I sit, Your Honor, until we --

15 THE COURT: Yes, you may. I have to decide who is
16 going first. I do believe I am going to let the plaintiff --
17 what?

18 MR. NAEVE: Your Honor, I actually would like to
19 volunteer to go first on this one if I may?

20 THE COURT: I'm not so sure about that. What I was
21 about to announce is that I think we should have the
22 plaintiff go first, the defendant respond, and the plaintiff
23 rebut. What is your position?

24 MR. NAEVE: What I was going to suggest,
25 Your Honor, is that the first thing we need to discuss is the

1 analytical framework by which this case should be evaluated.
2 Mostly, because I think that then governs the rest of the
3 conversation for obvious --

4 THE COURT: How long does that discussion take?

5 MR. NAEVE: Not very.

6 THE COURT: I need an answer. How long does
7 that --

8 MR. NAEVE: Five minutes.

9 THE COURT: I have no idea --

10 MR. NAEVE: I'm not sure, Your Honor. I'm five
11 minutes. I don't have --

12 THE COURT: Okay. We'll give you five minutes.
13 I'm not sure -- not yet. Not yet. Not yet. We'll give you
14 five minutes for this thing you want to do. We'll give the
15 plaintiff five minutes -- we'll give the plaintiff however
16 long they want. We'll give you an opposition time. We'll
17 give the plaintiff a rebuttal time.

18 I now need to ask the defense, what's the total
19 amount of time they want?

20 MR. NAEVE: Apart from that, Your Honor --

21 THE COURT: No. No, not apart from anything. Let
22 me state it again. What is the total amount of time the
23 defense wants?

24 MR. NAEVE: 15 minutes, Your Honor.

25 THE COURT: What is the total amount of time the

1 plaintiff wants?

2 MR. AMBERG: 15 minutes.

3 THE COURT: All right. You have plenty more than
4 that, but we'll generally lean to that.

5 First to you, Mr. Naeve, for your five minutes of
6 such.

7 MR. NAEVE: Your Honor, the issue that a wanted to
8 address is the role that the Press-Enterprise test plays in a
9 case like this. Once the Court gets into the analysis of the
10 various factors, we have less to disagree with. The question
11 is, how does the Press-Enterprise test work? As we
12 understand the Court's opinion, the Court is defining --
13 essentially, is saying that the Press-Enterprise test defines
14 what access is not required.

15 Your Honor, if I could focus the Court -- I'm not
16 quite sure that's quite accurate. I understand this case is
17 different. I also understand that we have to deal with the
18 Planet decision. The paradigm that Press-Enterprise sets out
19 is -- it's -- simply this, you look at the access, the right
20 that is provided, and the right that is claimed not provided.
21 The question is, does experience or logic grant a right of
22 access that is greater than what has already been provided?
23 The examples that we give you in the briefs, but they're
24 important to sort of talk about, the best one is the probably
25 the California First Amendment case because that has to do

1 with the death penalty. The State of California at the time
2 granted review of -- at the time when -- when the -- after
3 the prisoner was strapped down, and the press said, no we
4 want to see it all. So the question under Press-Enterprise
5 was, is there a right of access greater than what the state
6 currently provides? That, seems to me, is what the question
7 is here.

8 I think we believe that the facts are undisputed as
9 to what the Orange County Superior Court provides. The
10 question is --

11 THE COURT: I don't -- I think I spent a great deal
12 of time --

13 MR. NAEVE: I'm with you on that.

14 THE COURT: Hold on. Let me finish, please.

15 I think I spent a great deal of time in my opinion
16 saying you don't agree on what they provide.

17 MR. NAEVE: I understand, Your Honor.

18 THE COURT: Go ahead.

19 MR. NAEVE: I wanted to defer to that to my other
20 time, but I guess the point is if we tee up what the Court
21 provides, the question is, does the Press-Enterprise test
22 require us to provide greater access number one. Number two,
23 in that vein, another suggestion that appears around pages
24 21, maybe 29 of the Court's opinion is that the time, place,
25 manner test defines timeliness. And under the

1 Press-Enterprise test, that is not -- we wouldn't
2 characterize it quite that way because it's a defense that we
3 have a burden of showing, but that assumes that timeliness
4 under the first part hasn't been granted. Even if it hasn't
5 been granted, you're still off the hook if you satisfied
6 those tests.

7 So that's showing we were proceeding on our
8 briefing. I just wanted to make the point of clarifying how
9 we think these tests play because there's -- they are not
10 quite how the Court is described them in its very detailed
11 and, frankly, exhaustive opinion, otherwise. So that was
12 my -- that was the point that I wanted to make and whether we
13 wanted to chat about that was my first issue.

14 THE COURT: Well, the Court is aware of the
15 argument you're making. I think I stand by the approach the
16 tentative has taken. I believe you can make these arguments
17 during your response to what we are about to hear from the
18 plaintiff. Thank you.

19 MR. NAEVE: Thank you, Your Honor.

20 THE COURT: Go ahead with the plaintiff.

21 MR. AMBERG: Your Honor, if it pleases the Court, I
22 would like to simply go into my argument, if I may, and I
23 agree with the Court's suggestion that I think we're going to
24 cover the applicability of the Press-Enterprise test and the
25 other authorities that the Court is relying on.

1 THE COURT: All right. I'll note that Mr. Naeve
2 referenced particular pages. You know, having, I think, this
3 is the second longest opinion I've ever issued. Having done
4 that, it's always most helpful if you can refer to specific
5 mistakes of fact or law in the opinion, which you received
6 yesterday, which may not be enough time to fully review 47
7 pages -- 41 pages.

8 Go ahead.

9 MR. AMBERG: Well, I agree with Mr. Naeve. It was
10 detailed. It was exhaustive.

11 THE COURT: I'm never sure whether you're saying
12 exhaustive or exhausting. Go ahead.

13 MR. AMBERG: I was careful not to say exhausting.
14 Thank you, Your Honor. It did provide guidance to us. It
15 does give me some things I would like to address. Briefly, I
16 would like to address the jurisdictional question, the first
17 issue that the Court addressed. The same issues that the
18 Court is addressing itself to here are the issues that are
19 now currently before the Ninth Circuit Court of Appeal. I
20 would like just without repeating our brief, because I don't
21 think it warrants that, just to respond to one argument that
22 we saw in the reply brief.

23 This is not a disguised motion for reconsideration.
24 We came before the Court last fall, made a motion to stay,
25 which the Court denied. Subsequently -- and this was while

1 the interlocutory appeal was pending before the Ninth
2 Circuit -- the Orange County Court filed its answering brief.
3 We had asked that the two appeals, the Planet appeal and the
4 interlocutory appeal be consolidated and --

5 THE COURT: I know that but why don't you address
6 our specific response as to why your argument doesn't work?
7 We were pretty specific distinguishing why a stay is not
8 appropriate here. We cited cases.

9 MR. AMBERG: Yes.

10 THE COURT: We talked about the -- when I am
11 limited in further review of the case. So it's the
12 application of those specific cases, not your recitation of
13 the facts leading up to the dispute. Go ahead.

14 MR. AMBERG: I -- I simply wanted to underscore
15 that we are faced with new facts here. Since we were before
16 you with a motion to stay, the Ninth Circuit did, in fact,
17 consolidate the two appeals for oral argument. We're now
18 waiting for the --

19 THE COURT: I don't think that goes to the core of
20 why we ruled against you on that, but go ahead.

21 MR. AMBERG: I want to make the Court aware of that
22 and that the -- the issue that the Court is left with in the
23 41-page decision, the tentative, namely, what is timely
24 access? That is the question that is before the Ninth
25 Circuit. So I will leave it there.

1 Let me move into the --

2 THE COURT: Okay. Well, I realize that. By the
3 way, in the analysis we provided in the tentative, that was
4 the closest arena where a case is cited by you might lead to
5 the result you want, and we attempted to say why. And other
6 than identifying the problem, you haven't convinced me that
7 the analysis is wrong. I'm just telling you. You've
8 identified the problem. That's where the rubber meets the
9 road. We made our ruling. You identified the problem, but
10 not told me why the analysis is wrong.

11 MR. AMBERG: Well --

12 THE COURT: I'm just saying.

13 MR. AMBERG: I -- I understand. I think for
14 purposes, though, of efficiency in this hearing, I would like
15 to move to the merits, if I may.

16 THE COURT: Okay. Good.

17 MR. AMBERG: First of all, I would remind the
18 Court -- and I think the Court understands this, but just as
19 a predicate, Courthouse News is not suing for same-day
20 access. We're suing for timely access. It is our contention
21 that timely access can and should be same-day access, but we
22 recognize that there may be variables that come into play.
23 So it's very clear we're not suing for same-day or instant
24 access.

25 Now, we did present -- I -- so I take issue with

1 the Court's analysis of the evidence that we submitted
2 through the 34 declarations of various reporters, as well as
3 testimony from various witnesses who have been deposed in the
4 case, we believe that under the experience leg of test, we
5 established that there, in fact, is a historical tradition of
6 providing same-day access to newly filed complaints
7 throughout the country.

8 THE COURT: That experience has to occur in how
9 many states?

10 MR. AMBERG: Well, you said 25 wasn't enough. Let
11 me just point out I don't believe that the -- that the
12 Court's authority specifies the number of states in which
13 this has to occur. I don't think that 25 is an insignificant
14 number. More --

15 THE COURT: We didn't say it was insignificant.

16 MR. AMBERG: And more importantly, I don't think it
17 has to be uniform. It don't think it has to be universal. I
18 don't think we have to show anything more than that there is
19 an historical --

20 THE COURT: I don't think -- you know, the argument
21 is not helping me. I didn't require uniformity. I didn't
22 require universality. I asked a specific question. I am
23 waiting for an answer.

24 MR. AMBERG: Well, let me speak to the evidence --

25 THE COURT: The best answer may I say is, something

1 less than what you've provided would be the best answer, but
2 I haven't gotten a specific answer yet. Go ahead.

3 MR. AMBERG: We thought that we had sufficiently
4 shown that there was a tradition throughout the country. We
5 pointed to a number of different states. Let me just say, I
6 believe that the Court's tentative is in error because it
7 cites for example, two states which it says we didn't submit
8 any evidence on. Those being Arizona and Colorado. Those
9 states, in fact, are covered in the declaration of Jamie
10 Ross.

11 THE COURT: All right. Just a moment. Do you know
12 where you're talking about in the tentative? If you don't,
13 I'll look it up. You're saying Arizona and Colorado are
14 covered in the declaration of who?

15 MR. AMBERG: Jamie, J-A-M-I-E, Ross, who is a
16 bureau chief for the states as well as others.

17 THE COURT: Okay. All right.

18 MR. AMBERG: Also, the Court made reference to the
19 declaration of the reporter, I think, Mr. Lopez who talked
20 about his experience in the San Diego Court. And in his
21 declaration, as in declarations of other of the witnesses,
22 which we had submitted, he talked about the fact -- and the
23 Court focusing on this -- that currently access is not what
24 CNS would like. That we're not getting a high percentage of
25 same-day access.

1 But the point of the declaration in Mr. Lopez's
2 case and in the case of other courts that are described, is
3 that there was a history. In prior times, we did get
4 same-day access. We got much better access than we're
5 getting now. What has happened is a degrading of access.
6 That is, in fact, what has led to the filing of this suit the
7 suit in New York, the Tingling case. The suit in Texas, the
8 Jackson case. The suit in Cook County, Illinois, the Brown
9 case. Those courts, the New York Court, the Cook County
10 Court were courts that historically gave same-day access and
11 over time degraded.

12 So the point being made here is not only is there
13 currently a wide number of courts throughout the country that
14 do provide same-day access or near same-day access, and that
15 is supported by the declarations from the reporters, but that
16 the reporters' declarations also show what had been a
17 historic good practice, same-day access or near same-day
18 access has now degraded. That's what we're trying to fight
19 here. That's why we're here.

20 In fact, Mr. Girdner's declaration points out that
21 at least as recently as 2002, we did get near same-day access
22 in Orange County because we could go see the paper
23 complaints. That were put in what they call the reporters'
24 bin.

25 THE COURT: Okay. In determining experience, are

1 you suggesting we need to look in the past even if it doesn't
2 exist today? That seemed to be what you were saying about
3 San Diego. Did I miss that?

4 MR. AMBERG: Well, let me just point to -- I think
5 the Court quotes from cases that talk about a historical
6 tradition. So the point is --

7 THE COURT: Hold on. You're not answering the
8 question.

9 MR. AMBERG: Okay.

10 THE COURT: Historical traditions can stop. We had
11 a historical tradition of slavery in Alabama. I don't think
12 it would be fair to say that slavery is now a factor that
13 meets the experience test because it's no longer there. So
14 I'll go back to my question, as you bring up San Diego, do we
15 look at what is going on now or what went on in the past,
16 which is it?

17 MR. AMBERG: Well, I think we can look at both
18 because there is helpful evidence in experience, both
19 current-day experience in courts like Fresno or Los Angeles,
20 which is an even bigger court than Orange County, that do
21 provide same-day access. We can also look to the -- the
22 recent past where there was a tradition of providing same-day
23 access, but which has gone away.

24 THE COURT: Okay. Fine. You haven't answered the
25 question. It's okay, but you haven't answered the question

1 about whether I can consider past experience if it's no
2 longer the case in that jurisdiction. You're --

3 MR. AMBERG: Well, I'm sorry. I believe that you
4 can.

5 THE COURT: Okay. What authority do you have for
6 doing that?

7 MR. AMBERG: Well --

8 THE COURT: It's not meant to be a tough question.
9 I'm just trying to understand. What authority do you have
10 for doing that? We cited San Diego. You rejected it saying
11 they used to do it. I'm asking you, can I rely on what they
12 used to do if they're not doing it now? Simple question.
13 Your obvious point is -- the simple answer is yes,
14 Your Honor, logic tells me that, not case law or anything
15 else. I'm not even hearing that. I'm just hearing yeah, you
16 think you should.

17 MR. AMBERG: I haven't gotten to the logic test yet
18 either.

19 I do believe that the Court can consider what had
20 been the historical practice that reporters could go to the
21 courthouse, and on the same day of the complaints were filed,
22 they had easy access to the complaints. They were either
23 provided to them in a bin. You can see references to the
24 reporters' bin, or they could go behind the counter and look
25 at those complaints. That is still going on in many courts.

1 Courts that remain on paper and courts that have gone to
2 electronic filing, nevertheless, provide same day-access.
3 The obvious example is the Pacer system used throughout the
4 United States by the federal courts. We do refer to the
5 federal courts. That's an example of a system that allows a
6 reporter, including the CNS reporters to have instant access
7 to filed complaints.

8 THE COURT: Uh-huh.

9 MR. AMBERG: I don't think it's irrelevant that
10 there is a history and a pattern and practice in the past or
11 that there is a new practice or current practice. What has
12 happened is why is it relevant to consider both past and
13 future or past and present? That's because there has been a
14 change in technology. We recognize that.

15 Orange County in 2013 went to mandatory e-filing.
16 Many other courts have made that same transition. The
17 federal courts did it without denying access. What we saw
18 was in some courts where e-filing was implemented, we saw
19 delays. We saw a barrier between the reporter and the newly
20 filed complaints.

21 That explains why historically it is important to
22 look at past practice and the current practice because it's
23 only technology.

24 THE COURT: Okay. I understand the argument.
25 Perhaps, it's an argument I would accept, but now I'm going

1 to turn it on its face. If I'm looking at experience, is
2 your case more helped than hurt by someone who tried it the
3 way you would like and then changed it. In other words, that
4 might be a more powerful argument against you than someone
5 who just never tried it.

6 MR. AMBERG: If by try it --

7 THE COURT: Sort of like in religion. Some
8 religions are much harder on people who used to be X and
9 decided they are not X than someone who was never X.

10 So what about that? I mean, does it cut the other
11 way?

12 MR. AMBERG: Well, I don't hear anybody saying, you
13 know, we're going to implement e-filing because we think it
14 was improper that reporters were able to see complaints the
15 same day they were filed. In other words, obviously, the
16 march of technology has nothing to do with and isn't
17 motivated by what access the press gets, but the press got
18 forgotten in this process.

19 THE COURT: Uh-huh.

20 MR. AMBERG: Again, that's why we're here. That's
21 why we were in New York and Chicago and the other places is
22 to remind the courts we have a tradition and an important
23 value we're upholding here. Don't leave us out of the
24 process. We need to have that same access that we
25 historically did enjoy.

1 THE COURT: So you mention an important value.

2 Let's just drop a quick footnote. In like two sentences, can
3 you tell me the important value?

4 MR. AMBERG: Well, sure. I think this goes to the
5 logic test. I think the Court has taken a very narrow --
6 unnecessarily narrow view of what is intended to satisfy the
7 logic test, but as we've argued and supported by the amici
8 that we submitted or that was submitted, the brief that was
9 submitted by, among other people, the L.A. Times and the AP,
10 and McClatchy and Gannett and all of the other big news
11 organizations, we recognize and I think the Court does an
12 eloquent job of describing the value of press access to the
13 judicial process and, in particular, the important --

14 THE COURT: Okay. Let me just say that was quite a
15 throat clearing. Let me ask, can you say in a sentence or
16 two the important value?

17 MR. AMBERG: Yes. I think the important value is
18 access -- public access to the operations of the government
19 specifically, the filing of new complaints in the courts of
20 this county.

21 THE COURT: Why is that important?

22 MR. AMBERG: Well, I think it's important for an
23 informed citizenry. It's important that people understand
24 the workings of their government. It's important because the
25 filing of the complaint is the first shot in the new lawsuit.

1 These are important facts. I think the Court recognized that
2 in its opinion.

3 THE COURT: Okay. Well said. I just wanted to
4 hear you say it. You said it very well.

5 MR. AMBERG: So yeah, I would say that goes to the
6 logic test. I think the Court, if I understand the
7 tentative, construed the logic leg of test as somehow
8 providing support to the operation of the clerk or the
9 clerk's office that somehow access has to facilitate or
10 support the processing of the new complaints. If I
11 misunderstood that, obviously, I stand corrected. I -- I --
12 that is how I understood the Court was interpreting and
13 applying the logic test. And, you know, with all due
14 respect, I don't think it is so narrowly construed.

15 I wouldn't say that public access to the filing of
16 new complaints is irrelevant to the function of the public
17 court in Orange County. I think, in fact, it is an initial
18 part of that.

19 THE COURT: I don't recall anyone saying it was
20 irrelevant. I don't recall that. I don't think I said that.
21 I don't think anyone would say that. Go ahead.

22 MR. AMBERG: Okay.

23 So I -- I think that first of all, we have provided
24 ample evidence to the Court under the experience test that
25 would establish there is a tradition and a history of

1 same-day access to newly filed complaints here and elsewhere
2 throughout the country. Not only did we support that with
3 declarations of the reporters based on their personal
4 experience, but we also submitted through Mr. Fetterly's
5 declaration. He attached various deposition excerpts,
6 testimony by Mr. Yamasaki himself. I took Mr. Yamasaki's
7 deposition before he was the chief executive officer for
8 Orange County. He filled that same function in Santa Clara
9 County.

10 He talked to me about the fact that reporters in
11 Santa Clara County got same-day access to newly filed
12 complaints. We reminisced about it together. That wasn't --
13 that -- and it had been the practice, as Mr. Girdner's
14 declaration established, here in Orange County. That has
15 changed. Mr. Yamasaki acknowledged that that had been the
16 practice.

17 The other point I guess that I would simply add is
18 in the Planet case, Judge Otero received and considered the
19 same declarations that were submitted here. If you know the
20 same --

21 THE COURT: Certainly, the same declarations, but
22 an entirely different Court.

23 MR. AMBERG: I understand. The Court is free to do
24 with that evidence what it sees fit.

25 THE COURT: You know, for the record, I don't

1 consider this opinion as contrary to Judge Otero, a judge who
2 happens to be a dear friend but also a respected colleague.
3 A good approach from you would be to tell me I shouldn't be
4 reversing Judge Otero, particularly aspects of him that were
5 affirmed on appeal.

6 MR. AMBERG: Well, I want to be very careful about
7 drawing contrast or distinctions between the tentative and
8 Judge Otero's opinion. I think Judge Otero did accept the
9 evidence. I think he did find that there was --

10 THE COURT: Hold on. I'm sorry. I hate to mince
11 words with you. Are you suggesting we didn't accept the
12 evidence?

13 MR. AMBERG: No.

14 THE COURT: Okay. Go ahead. I just want to be
15 clear. You know, there's a request for judicial notice and a
16 lot of stuff. Okay. Go ahead.

17 MR. AMBERG: No. But I do read the tentative as
18 saying that there either was a failure of proof or that it
19 was inadequate to establish on an experience test that
20 same-day access --

21 THE COURT: Uh-huh.

22 MR. AMBERG: -- had been established.

23 I believe that Judge Otero reached a different
24 conclusion. I -- the point is that at this point in the --
25 in the analysis, the burden shifts. The right -- there is a

1 right of access. There is a right of timely access. I think
2 that we've established that. The burden shifts then to the
3 government -- to the Orange County Court to justify its
4 delay. It can do so under either of the two tests that the
5 Court has -- has discussed.

6 The Court seems to believe that unless there's a
7 complete closure or -- or -- or something analogous to
8 closure, the strict scrutiny test doesn't apply -- the Court
9 seems to believe that the strict scrutiny test doesn't apply
10 in this case unless it's a case of a closure or something
11 equivalent to closure. Of course, we're talking about the
12 Leigh or Leigh versus Salazar.

13 THE COURT: You're arguing in this case of access
14 strict scrutiny should apply?

15 MR. AMBERG: We have taken that position, and we --
16 and so I disagree with the Court. At least this is -- I want
17 to be careful about this because -- because I'm not sure
18 exactly how far the Court is going with this point, but the
19 Court seems to think that strict scrutiny didn't apply here
20 because that applies only to closure. Yet, we know from
21 other cases that we've briefed and, in fact, from looking at
22 Salazar or Leigh versus Salazar -- let's talk about Lee
23 versus Salazar for a minute. There a photographer was
24 seeking to photograph the rounding up of wild horses and
25 performing some public information function. She wasn't

1 prevented from photographing the horses. She wasn't
2 prevented from photographing the round-up. There wasn't a
3 complete closure. She was just told where she can go and
4 stand. There were restrictions that were put on her access
5 to the event being photographed.

6 Lee versus Salazar applied the strict scrutiny
7 test. We saw the strict scrutiny test likewise being applied
8 in the Brown case in Cook County and I think in the Jackson
9 case in Texas. The point in the Brown case that was recently
10 decided by the District Court there was that delay can equal
11 closure or denial, just like we know that justice delayed can
12 be justice denied. We've also submitted evidence and we've
13 argued and the -- and some courts have so recognized that
14 delays in access to newly-filed complaints means that they
15 lose their news value. They are no longer newsworthy. They
16 don't get reported on or they get buried.

17 THE COURT: Is it also relevant that the most
18 important factor is the selection of an attorney to handle
19 the case? Is that relevant for me to consider? Is that a
20 First Amendment issue? I do sometimes wonder, as you note
21 from past comments, that what is really going on is that
22 Sheppard Mullin needs this to contact general counsel before
23 Gibson Dunn contacts general counsel. I do wonder how
24 much -- I'm a little frustrated because sometimes I think
25 that is really the motivating factor or the prime motivating

1 factor. Yet, we get lost in important -- very important
2 discussions of First Amendment.

3 So you just talked about newsworthiness. Oh, my
4 goodness I understand that. I've seen enough movies about
5 getting scoop and all of that. My question here is not
6 intended to be aggressive or whatever. Should I consider
7 that there is a First Amendment interest in making sure your
8 subscriber finds out about a case, contacts general counsel,
9 maybe it's their existing client; maybe a new client, and
10 gets hired quickly before someone else does? Is that a
11 factor I should consider? And I still have a question of how
12 much that is the motivation here.

13 Go ahead.

14 MR. AMBERG: There clearly is a First Amendment
15 value. There's a news value to reporting on the newly-filed
16 complaint and the relevant data. And -- and, of course, what
17 we do is we write a summary. We talk about what the issues
18 in the case are and so forth.

19 THE COURT: CNS does a good job on that. I had a
20 trial pending where I see CNS reports on it.

21 Your question did not ask how much the motivation
22 of this is for high callings of newsworthiness versus other
23 callings for contacting a competitor -- contacting a firm
24 before a competitor does.

25 MR. AMBERG: I understand. I was going to get to

1 the question.

2 THE COURT: I'm sorry.

3 MR. AMBERG: I stood here last June in the
4 scheduling conference. You asked me essentially the same
5 question.

6 THE COURT: Uh-huh.

7 MR. AMBERG: And as you know, we have briefed this
8 question. We've filed supplemental briefs in connection with
9 a preliminary injunction motion a year ago. I know it's come
10 up. It isn't -- the Court -- I will say, as I read the
11 tentative, I don't see the Court focusing on the motives of
12 my client or the motives of its subscribers. I think that
13 was a proper approach.

14 I don't think that the commercial motives or the
15 fact that my client sells a subscription or that many of its
16 subscribers happen to be lawyers or law firms who are
17 obviously in business, I don't think that that is relevant.

18 THE COURT: Okay. You don't think it's relevant.
19 I -- I understand. Okay. Go ahead.

20 MR. AMBERG: So we have established a right of
21 timely access. We think the evidence does support the notion
22 that there is a tradition of same-day access. The burden
23 shifts, as I said, to the government, to the Orange County
24 Superior Court.

25 THE COURT: Can I just ask one more reason -- one

1 more question. Would you agree that overwhelmingly your
2 subscribers are law firms?

3 MR. AMBERG: Yes.

4 THE COURT: All right. Go ahead. I understand
5 your position on that.

6 MR. AMBERG: We've submitted the statistics on all
7 of that.

8 THE COURT: Yes. Go ahead.

9 MR. AMBERG: And we were talking about the strict
10 scrutiny test. I simply pointed out that Leigh versus
11 Salazar wasn't a closure case, but they applied the strict
12 scrutiny test. I mentioned the Brown case, our case in Cook
13 County, Illinois.

14 THE COURT: Leigh versus Salazar was the horse
15 case?

16 MR. AMBERG: That's right. That's right.

17 THE COURT: Aren't the facts different there?
18 Isn't -- isn't there a denial of any access at all if they
19 don't see it as it's happening?

20 MR. AMBERG: I think they were -- no. As I recall
21 the facts of the case, she was allowed to photograph. She
22 was just put in a safe place. They said, we don't want you
23 to get trampled by the horses. So we'll segregate you and
24 restrict your access over here. You can photograph from over
25 here. That's what she complained about.

1 THE COURT: Okay. All right.

2 MR. AMBERG: As I recall.

3 THE COURT: Thank you for that answer.

4 MR. AMBERG: The point is, I guess, there are other
5 cases dealing with the right of access not closure that
6 recognize that denying access or delaying access -- the delay
7 can amount to closure; therefore, on that basis, strict
8 scrutiny test does come into play. It comes into play both
9 because factually it's applied in those kind of situations.
10 It applies if you are looking for closure because closure may
11 be the equivalent of delay.

12 So under that test, it's the burden of the Court to
13 show that they have narrowly tailored their policy and
14 practice to serve whatever overriding government interest
15 that they've identified. Let me make it perfectly clear
16 because I think it really bears saying. CNS is not attacking
17 anyone's interest in confidentiality. We're not attacking
18 privacy. We're not saying that those are not values.

19 THE COURT: Well, you're minimizing it. I mean, I
20 don't know if that's an attack, but....

21 MR. AMBERG: No. Let me explain if I may. I think
22 this is an important point. The Court has said that we must
23 process before providing access. That in a nutshell is our
24 debate. Process before access or access before process. The
25 process, of course, is the administrative process that they

1 use when they receive a new complaint. That is what Judge
2 Otero said. You know, you haven't demonstrated that that is
3 sufficient to justify the delay.

4 Here, Orange County has articulated a particular
5 interest, that's the interest in confidentiality. They point
6 to the fact that under a half dozen statutes in California,
7 certain complaints are supposed to be filed confidentially.
8 Let's also be clear -- I'm sorry. I have to take a step
9 back. CNS does not report on sealed cases. Never have.
10 We're not suing for it. So that's not at issue here.

11 THE COURT: I don't think I suggested it was. It's
12 not an issue. Understood.

13 MR. AMBERG: Okay. I mention it because the Court
14 included sealed cases when it was considering the statistics
15 and the frequency --

16 THE COURT: Ah, hold on just a moment. Okay. I
17 understand your argument. Go ahead.

18 MR. AMBERG: So let's talk about confidentiality.
19 We don't minimize the value or the interest --

20 THE COURT: I think -- I think we included the
21 sealed case because it was part of the review. So I think
22 they needed to be included because it was part of the review.
23 It was not meant to suggest that you're asking to get the
24 sealed cases, but it is certainly something the Court has to
25 look at, indeed the most important thing for the Court to be

1 looking at. That's why they were included.

2 MR. AMBERG: The point is when cases are sealed or
3 filed with a motion for sealing, those are
4 automatically segregated; in other words --

5 THE COURT: Okay. Go ahead.

6 MR. AMBERG: -- they're identified.

7 Consequently, not only are we not seeking them, but
8 they are easy for us to move past.

9 THE COURT: Okay.

10 MR. AMBERG: Because no one is going to look at
11 those. What the Court says is, well, people are fallible, we
12 need to protect filers from themselves, because they'll make
13 mistakes. They may file a complaint that falls within one of
14 these confidential categories. Our staff need to review the
15 complaint and catch those. We believe -- I would certainly
16 contend that the evidence that the Court has submitted --
17 that Orange County has submitted to meet their burden of
18 proof on the affirmative defense is I would say
19 underwhelming.

20 In other words, they don't point to very many
21 instances. Many of the instances that they do offer -- and
22 they offer the declaration of Ms. Kruse, who is one of the
23 supervisors of the intake process. When we take a closer
24 look at the examples that they offer where they say they
25 caught complaints that otherwise would have been released to

1 the public, well, there aren't too many of them. In many
2 cases, they don't, in fact, relate to this case.

3 Let me give you an example. So there was some
4 cases where they say, we saw the comments. We caught it
5 because it was clear in the comments that the filer intended
6 for it to be confidential. Well, once again, that is relying
7 on the filer. The filer has to know that he's got to write
8 comments in the comments box to identify the confidential
9 nature of the case. They also offer the example, I think,
10 maybe it was an amici did -- I think they briefed this
11 earlier. Well, there was concern about the privacy rights of
12 defendant. You have a complaint -- the plaintiff isn't going
13 to worry about the privacy rights of the defendant. In a
14 landlord/tenant dispute, who is going to protect the privacy
15 rights of the defendant?

16 THE COURT: Yes, indeed. I think that was under
17 covered in the briefing. I'm going to add to that. The age
18 old practice of declaratory relief actions where the defense
19 files first. So let's take a trade secret case. I think I'm
20 going to get sued by Coca-Cola in Atlanta for stealing their
21 trade secret. So I file a declaratory relief action in the
22 Orange County Superior Court saying I want a declaration that
23 I'm not following -- violating code -- the formula for Coke.
24 In my papers, I say here is my formula. It happens to be the
25 Coca-Cola formula for Coke.

1 It is the defense that is hurt horribly if you
2 think the trade secret for Coke is significant, which they
3 sure do in Atlanta. I think the papers excessively ignore
4 the defense interest, particularly let's say in a declaratory
5 relief action where the roles of the party are reversed.

6 MR. AMBERG: We don't actually have any evidence of
7 what you're talking about. I -- I recognize that potentially
8 there is a risk there, but we don't have any evidence. No
9 evidence has been submitted. The evidence that was submitted
10 was a landlord/tenant dispute. That was a limited
11 jurisdiction case. We're talking about unlimited civil
12 complaints. That was completely irrelevant protecting the
13 privacy rights of the landlord. That shouldn't -- yet, the
14 Court has picked that up and cited that in the tentative
15 opinion --

16 THE COURT: I think regardless of whether -- are
17 you saying that only occurs in limited cases and not in
18 unlimited cases? Surely you're not. Surely, you see it
19 happens in a -- if it happens in a limited case, it surely
20 might happen in an unlimited case. You're not debating that,
21 are you?

22 MR. AMBERG: No.

23 THE COURT: You're not debating that there could
24 possibly be trade secrets affecting the defense in a case,
25 particularly in, say, a declaratory relief case? You're not

1 disputing that? You're quibbling whether it's limited or
2 unlimited, but in the process are you actually debating that
3 possibility?

4 MR. AMBERG: Let me take your example of the trade
5 secret case. The clerk does not read the complaint. They
6 testified to this. They look at the cover page and they look
7 at the comments section. That is the practice of Orange
8 County Superior Court. They don't read the complaint.

9 THE COURT: So they're trying to accommodate you?

10 MR. AMBERG: In -- in your example, someone recites
11 the formula in the body of the complaint. The Orange County
12 Superior Court Clerk's Office would not have found that,
13 would not have made a decision that that should be somehow
14 put under a confidential imprimatur. That is exactly why we
15 do put responsibility on the filer.

16 The point is -- this is what I want to get to.
17 Under the test, they have to choose the -- the -- they have
18 to tailor the policy so that it doesn't infringe on this
19 right of access. And under the alternative, time, place, and
20 manner test, because you consider both in the opinion, they
21 have to choose the least restrictive means. Two comments
22 about that.

23 First, when I took the deposition of Mr. Yamasaki,
24 and I took the deposition of Mr. Wertheimer, the general
25 counsel. I asked well, what alternatives have you

1 considered? How -- what other ways have you considered
2 protecting the privacy or confidentiality of your cases?
3 Basically, the answer was none. We're satisfied with what we
4 do. So they haven't considered least restrictive means.

5 THE COURT: Let's go back to the issue of a
6 declaratory relief action. What if the caption mentions
7 trade secret on the front page? That would be caught,
8 wouldn't it?

9 MR. AMBERG: I don't know it would.

10 THE COURT: By caption I mean the description --

11 MR. AMBERG: Trade secret is not one of the legal
12 categories that they are instructed to look for. It's not.

13 THE COURT: Okay. You are -- well beyond -- more
14 than doubled the 15 minutes. It's funny how things take
15 longer than we hoped they would. That was a little snarky.

16 MR. AMBERG: It's all right. I'm responding to the
17 Court's questions.

18 THE COURT: You sure are. How much longer do you
19 need? I have a couple more questions. Let me ask these
20 questions.

21 MR. AMBERG: All right.

22 THE COURT: You know, on the issue of -- what was
23 it -- you said that the declaration by -- by Jamie Ross --

24 MR. AMBERG: Yes.

25 THE COURT: -- references what, Colorado and

1 Arizona?

2 MR. AMBERG: That's correct.

3 THE COURT: I don't think that was in the AMF, and
4 I don't think you cited those declarations in your facts. Do
5 you have me rooting for truffles here, or what?

6 MR. AMBERG: Truffles are delicious, but I don't --
7 I'm sorry. I can't answer your question. I apologize.

8 THE COURT: Here's another thing. You asked for
9 judicial notice of web pages; right?

10 MR. AMBERG: Court web pages.

11 THE COURT: Yes. Why would you just not file a
12 declaration?

13 MR. AMBERG: Well --

14 THE COURT: -- saying, I, Andrew Guilford, declare
15 under penalty of perjury that I searched this web page at
16 this address maybe even on this date and attached is Exhibit
17 A is what I found. Why turn it into judicial notice? I must
18 say, Counsel, all attorneys do that. It leads into
19 philosophical nuanced review of Rule of Evidence 201. I keep
20 asking myself, just stick it as Exhibit A to your
21 declaration. I don't know why people do that. Footnote, I
22 know why they do it in 12(b) (6) motions because you can look
23 beyond the face of a complaint to items judicially noticed.
24 But in a summary judgement motion, I'm always perplexed by
25 requests for judicial notice when you could attach it to a

1 declaration. Why didn't you do that?

2 MR. AMBERG: I noted the Court's comment.

3 THE COURT: Yeah. I also wonder if some of those
4 web pages get to the point of citing a law. I decided
5 ultimately, I couldn't say it's like citing a law. You don't
6 need request for judicial notice to cite regulations and
7 court rules to me. Okay. Enough of that.

8 Continue. I need to no how much longer?

9 MR. AMBERG: Another five minutes.

10 THE COURT: Go.

11 MR. AMBERG: I've gotten to the point. I'm trying
12 to walk through what I understand to be the analytical
13 framework. Establishing through evidence that we do have, in
14 fact, a right of timely access that historically has been
15 same-day access.

16 Shifting the burden then to the moving party, to
17 the defendant, to the government to justify its delays as
18 either narrowly tailored to serve an overriding government
19 interest, which they've tried to identify here, or in the
20 alternative, applying the time, place, and manner test which
21 requires them to apply the least restrictive means. The
22 point is that we've suggested a number of ways in which the
23 Court could both protect the privacy rights and
24 confidentiality requirements of the law and also provide
25 access to my client CNS on timely basis.

1 And -- and there is not any evidence that either of
2 those alternatives is either infeasible or too expensive.
3 There's just absolutely no basis for it. They've testified
4 in their depositions -- and we've seen it in the written
5 discovery -- they didn't consider these alternatives. They
6 haven't considered any alternatives.

7 So I would simply conclude by saying, Your Honor, I
8 don't believe that the moving party here is entitled to any
9 portion of the judgment as a matter of law. I don't think
10 they've met their burden of proof.

11 Finally, I would just say, we're still --

12 THE COURT: Oh, hold on. Throw in their burden of
13 proof and their Celotex burden. Two things. They have both.
14 That was an argument in your favor; right?

15 MR. AMBERG: Right --

16 THE COURT: When people say burden of proof in
17 summary judgement, I mean, they've got both here; right?

18 MR. AMBERG: Right.

19 THE COURT: Good. Go ahead.

20 MR. AMBERG: I just would conclude we are, frankly,
21 still digesting the decision. The fact that I may omit to
22 speak to every portion of the 41-page decision doesn't mean
23 that it isn't of interest to us, or that we don't have other
24 issues. Let me just focus my last comments.

25 As I understand the Court's proposed ruling, it --

1 I'm just going to -- sorry. Turn to the last page so I'm
2 looking at specifically at the Court's language. I see the
3 Court saying -- I'm just going to skip around in number two,
4 the public doesn't have a right to access new civil
5 complaints on the same day OCSC receives them. We clearly do
6 have a right to timely access. I think that the Ninth
7 Circuit said so in Planet I --

8 THE COURT: Oh, please. Is there anything in this
9 ruling that says you don't have a right to timely access?
10 You're saying things that are just not disputed. It almost
11 suggests my opinion says you don't have a right to timely
12 access.

13 MR. AMBERG: No. I'm adopting what I believe the
14 Court has found following the Ninth Circuit. My concern here
15 is it suggests -- number two suggests that the right to
16 timely access cannot mean, does not mean same day-access. I
17 don't think that follows from the evidence that has been
18 placed before the Court.

19 THE COURT: I totally understand that point.

20 MR. AMBERG: Okay. With that, I --

21 THE COURT: Thanks for your argument.

22 MR. AMBERG: Thank you very much.

23 THE COURT: All right. Mr. Naeve, we need to be
24 moving along.

25 MR. NAEVE: I can move you along, Your Honor.

1 THE COURT: Let me ask, in response to what you
2 said earlier, how would this opinion be different if we took
3 your analytic approach, particularly regarding
4 Press-Enterprise? How would the result be different?

5 MR. NAEVE: In our view, because -- ultimately,
6 Your Honor, I think we look at the facts differently, which
7 is a problem. So I will acknowledge that upfront. Our view
8 is that the parties say here are the numbers. We all agree
9 about the underlying numbers. The dispute between the
10 parties really is whether you count calendar days or business
11 days. That's a dispute that needs to be resolved. We got
12 testimony to that. I mean, that's pretty much the issue.

13 So putting that aside, Your Honor, I understand
14 that you have questions. That's what I want to get to. You
15 would grant summary judgement on the first point because you
16 held that experience and logic don't require same-day access.
17 That's really what they're asking for.

18 We've got interrogatory responses that say that
19 their 30(b) (6) declarant -- I deposed their 30(b) (6),
20 Mr. Girdner, he says the same thing. What they're looking
21 for is if it's electronic, give me in-box. I get it
22 instantly. You don't review. If it's paper, by the end of
23 the day. That's their standard. So you would grant summary
24 judgement on the first point. You would also grant summary
25 judgement on the second point for all of the reasons you've

1 explained in your opinion.

2 So that's how we see it come out.

3 THE COURT: Understood.

4 MR. NAEVE: Your Honor, whatever questions you have
5 about anything, I'm here to answer. But could I, though,
6 move us ahead. Honestly, the opinion, agree with it;
7 disagree with it, is lengthy and careful. So rather than try
8 to pick that apart, I think the real question from my
9 standpoint is assuming the Court adheres to the tentative --
10 I would encourage the Court to look at how Press-Enterprise
11 works in the other cases we cited -- oh, I am sorry. I will
12 do one more Press-Enterprise thing. I apologize for getting
13 out of order.

14 Leigh versus Salazar and all of those cases, which
15 counsel cites as showing why strict scrutiny should apply,
16 showed in our view the exact opposite. It is true that the
17 photographer Ms. Leigh, I guess, was allowed in certain
18 areas. Then she was prohibited from attending -- watching
19 the horse gather in that case in other areas. Just like the
20 reporters couldn't see how they put the needle in the arm of
21 the death penalty guy.

22 THE COURT: Yes. That was the thrust of my
23 question --

24 MR. NAEVE: Yeah.

25 THE COURT: -- to counsel.

1 MR. NAEVE: Yeah. I want to clarify that's why we
2 think this is not strict scrutiny. These are not -- they get
3 the complaints. It's a matter of when.

4 To get to the point, Your Honor, with respect to
5 what -- what the Court seems to be looking for is how do we
6 define what is timely past a day? Is it a day? Is it
7 18-hours? Is it this time? Is it that time? Your Honor, I
8 think -- if I could make a suggestion just a step back and
9 observe how you would analyze this, there obviously is, you
10 know, two types of lawsuit. One is a facial challenge to a
11 policy. Even in the First Amendment context, the general
12 rule is that the burden is on the plaintiff to show that
13 the -- facially, the policy or practice is unconstitutional
14 in virtually all of cases.

15 That rule is modified in First Amendment cases to
16 require a substantial number. I can give the Court cite to
17 the authorities. It's not something that came up. We didn't
18 anticipate we were going to go there. The point is that in
19 First Amendment cases, the rule is relaxed a little bit, but
20 there still is a burden of proving that there has to be a
21 substantial number of actual cases where someone has been
22 harmed where there's been real delay.

23 So, on that basis, Your Honor, I'm not -- that is
24 really what this case is about. They're saying Orange County
25 has this practice of processing and our First Amendment

1 rights are violated. This Court has said no rights of
2 same-day access, but we want to now parse out which one is --
3 what is timely and what is not. I don't know how you do
4 that.

5 THE COURT: I think we do that following the
6 existing law that we need to follow.

7 MR. NAEVE: Well, Your Honor, that would be a
8 case-by-case and as applied wouldn't it? So I'm raising the
9 question to Your Honor. It may be something we think about
10 and do more briefing. I apologize, but this is -- we were
11 working through this last night.

12 THE COURT: No more briefing.

13 MR. NAEVE: I understand. If the Court can
14 perceive the difference between a facial challenge, which
15 goes to the practice which is what is being challenged here,
16 and an as-applied challenge, which would say okay, what is
17 the reason for the delay of this particular complaint? Does
18 that meet constitutional muster? That is not something that
19 is teed up by the complaint because the complaint seems to
20 enjoin all practices.

21 And the -- the -- the Court's -- so my ultimate
22 question, Your Honor, is from a -- from a standpoint going
23 forward, what facts does the Court need at trial to fully
24 adjudicate, you know, the answer to this case? And -- I
25 would suggest that if you think about it from as applied

1 versus facial, this is a facial case. You wouldn't get to
2 the level of -- I don't think you get to the level,
3 Your Honor, of -- of detail that some of your questions seem
4 to imply.

5 I'm not sure I understand what the Court is looking
6 for in terms of evidence going forward for trial. So
7 that's -- that's really what I think we need to talk about.

8 THE COURT: Are you finished?

9 MR. NAEVE: Yes, Your Honor. Unless the Court has
10 questions about it? We understand what you wrote in your
11 brief -- in your order.

12 THE COURT: All right. I do have a question to
13 both sides. We spent an unfortunate even ungodly amount on
14 evidentiary issues and requests for judicial notice, et
15 cetera. Does anyone have any comment about that or want any
16 further elucidation about that?

17 MR. AMBERG: No, Your Honor.

18 THE COURT: Anything else?

19 MR. NAEVE: No, Your Honor.

20 THE COURT: Okay. Thank you.

21 So --

22 MR. AMBERG: Am I going to get my rebuttal?

23 THE COURT: You do get a rebuttal. How much time
24 do you need on rebuttal?

25 MR. AMBERG: Two minutes.

1 THE COURT: Please do so.

2 MR. AMBERG: I'll try to be even briefer. I want
3 to take you back to the first issue I touched on very
4 briefly. That is jurisdiction. I understand the Court's
5 view on that subject. So I'm not going to reargue that.

6 I'm going to propose the following, though,
7 because there is no question that the same issue that the
8 Court has identified here; namely, what is timely access?
9 That is the issue that it says is reserved for trial in this
10 case, which is scheduled currently for May 29th. That same
11 issue is currently pending in the consolidated appeal.

12 I'm going to ask the Court for that reason and for
13 the reason that we have dates stretching out ahead of us.
14 I'm talking about the completion of fact discovery, expert
15 depositions, and most significantly for my client, CNS has a
16 deadline of March 19th to bring its own motion for summary
17 judgment. That's only two-and-a-half weeks from now.

18 We have a 41-page tentative decision. Good
19 comments by counsel on both sides, if I say so myself.
20 Things that we've questioned in the decision that will come
21 out, but I don't know precisely when. The time is -- is --
22 is slipping away from us. What I'm moving for the Court to
23 consider is to stay this case in an exercise of its
24 discretion, given the fact that the central issue that you
25 have identified is currently before the Ninth Circuit, and

1 because we have a lot of work and a lot of very expensive
2 work immediately coming up. It would be a disservice to my
3 client, and, frankly, I think a disservice to the taxpayers
4 if we charged ahead and spent a lot of time and money getting
5 ready for motion summary judgement that is due on March 19th
6 and for trial.

7 THE COURT: Okay. Well, if you had addressed the
8 jurisdictional issue by comparing, you know, Plotkin,
9 P-l-o-t-k-i-n, with Griggs, G-r-i-g-g-s, and came to a
10 conclusion about that, it would have had more impact on me.
11 I told you my feelings on Griggs. I told you my feelings on
12 the stay arguments you're making. I didn't get anything
13 contrary to that. What I'm telling you here is, as I did at
14 the beginning, I welcome it.

15 MR. AMBERG: I'm moving past the jurisdiction
16 argument. Now I am addressing myself to the Court's inherent
17 power and discretion to control proceedings in its court. I
18 think the Court recognizes that this could very well amount
19 to a duplication of effort between the issues that are here
20 for litigation and the issues that are before the Ninth
21 Circuit.

22 It really is not very wise, very prudent for us to
23 be spending time and money in both courts on --

24 THE COURT: When you say not wise or prudent, come
25 on. Who filed the lawsuit in this Court?

1 MR. AMBERG: We did.

2 THE COURT: Who filed the interlocutory appeal?

3 MR. AMBERG: We did.

4 THE COURT: And are you an orphan crying for mercy
5 because their parent is dead?

6 MR. AMBERG: No. That was the point of my original
7 argument. This is not a motion for reconsideration because
8 new facts, new issues --

9 THE COURT: I should say, because they murdered
10 their parent to get the thing straight.

11 MR. AMBERG: I understand.

12 THE COURT: Go ahead.

13 MR. AMBERG: When Orange County filed its answering
14 brief, it raised the issues that this Court has now framed in
15 its tentative opinion. That's the point at which the Ninth
16 Circuit agreed with us and consolidated the two cases for
17 oral argument.

18 Before that, the -- the interlocutory appeal raised
19 threshold issues concerning the test and the application of
20 the Court's standard for preliminary injunction. That was
21 the issue that we took up on appeal. It was the Orange
22 County Superior Court's answering brief that injected the
23 issues going to the merits, which is what we are contending
24 with here.

25 So no, we are not orphans who have murdered their

1 parents.

2 THE COURT: Of course, you aren't.

3 MR. AMBERG: That wasn't what the point of the
4 interlocutory appeal was all about. That is what it has
5 become.

6 THE COURT: Okay. Let me tell you something that
7 concerns the Court that you wouldn't know about. That is
8 stays in this day and age. In the past, as a practicing
9 attorney for 30 years then become judge, I'm sympathetic to
10 why attorneys request stays. Saving money to their clients
11 and getting rulings from on far. I must say in my early
12 years as a judge, I often granted stays, but then I ran into
13 very difficult situations. Let's take certain issues of
14 arbitration. Certain issues of wage-and-hour cases. It
15 seemed to me half my time I was evaluating stays while the
16 Ninth Circuit heard something that goes to the California
17 Supreme Court on reference that comes back to the Ninth
18 Circuit that gets resolved and might be appealed on the
19 Supreme Court.

20 And I have sat around often waiting for decisions.
21 And numerous times after waiting two years, the decision I
22 get is a water sandwich that just didn't matter. They
23 punted. They waited for the Supreme Court. By the Supreme
24 Court, that could be the California Supreme Court or the
25 United States Supreme Court, and their decision is unclear.

1 And it -- it strikes me that in the past in controlling my
2 docket, it's a tough situation when I start waiting for the
3 Ninth Circuit to do something.

4 So I would ask, when do you think the Ninth Circuit
5 will rule on this? Do you think there will be a writ of
6 certiori. It struck me it is just easier. Even though 41
7 pages isn't easier, it's just easier and perhaps more
8 consistent with my requirement under the revamped Federal
9 Rule of Civil Procedure 1 that when someone files in my
10 court, they'll get a decision from my court.

11 Now, that may not be totally consistent with all of
12 the stay law. I do want to apply the stay law. I do want to
13 consider all of the factors. I'm just telling you this to
14 let you know in the past, I have come across a morass waiting
15 for the Ninth Circuit, their references to the California
16 Supreme Court, their possible certiori, et cetera.

17 Anything general to all of that? Your best
18 argument is to say, Judge, apply the law as it exists on
19 stay, and don't be overly affected by past difficulties that
20 might arise. I'm sure that -- I'll accept that as the
21 argument you just made. It's a good argument. It's a good
22 argument. I just struggle. I'm telling you I've waited --
23 I'd ask Ms. Bredahl to remind me how long it took two, three
24 years for a nothing decision. I'm back at square one with,
25 by the way, witnesses older, memories receding, and all of

1 that sort of thing.

2 How do you respond to that?

3 MR. AMBERG: Well, you -- you harken back to your
4 career before you took the bench. I've had a few years also
5 litigating. I have to acknowledge what the Court is saying;
6 that stays are not often granted and sometimes they do have
7 unfortunate effects. You can understand, of course, the very
8 reasons that on behalf of my client I'm asking for the stay.
9 I won't repeat those -- those remarks. I understand what the
10 Court is -- is telling me.

11 I guess I'm -- I'm taking the Court's remarks
12 polite and helpful as they might be as a no that --

13 THE COURT: No, no, no. It's not a no. I'm going
14 to think about it further now. I'm going to think about it
15 further in light of what you just said. I wish I had a
16 little more analysis of the Griggs situation, et cetera, et
17 cetera. But I -- don't ever give up. When I take under
18 submission, it's all under submission, including that.

19 MR. AMBERG: All right.

20 THE COURT: Okay.

21 MR. AMBERG: I -- I am going to throw out one
22 alternative. That is, should the Court decide to apply the
23 law bearing on stay and drawing on its own experience, and
24 should it deny the stay, then I would ask that the Court
25 consider amending its scheduling order and extending our

1 deadline for filing the motion for summary judgement.

2 Currently, our deadline is March 19th, I believe.

3 THE COURT: All right. Let me ask. Mr. Naeve,
4 what do you think about extending March 19th? Tomorrow being
5 March 1st.

6 MR. NAEVE: Today being March 1st, which is also my
7 birthday, Your Honor. So happy birthday to me. I beg your
8 pardon.

9 The answer is, any continuance we're hanging this
10 lawsuit over the Court and its operations. We object to any
11 continuance for that reason. There was no reason we -- we
12 filed our motion in November. The -- on facts, as you know
13 now, that pretty much have been settled almost a year ago.
14 There was nothing that prevented Courthouse News from filing
15 a cross-motion so we could have heard it at once.

16 Frankly, I suspect that if the Court says no, you
17 will see a motion so will we on the day and time. I don't
18 think there's a hardship to Courthouse News. This is all
19 trying to delay this case. What will happen is if the --
20 either we will get a judgment -- we hope we get a summary
21 judgement. If we don't, we get a trial. That goes up to the
22 Ninth Circuit. That will give a complete record that it
23 doesn't really exist in the Planet case for the panel to
24 consider. That, I think, Courthouse seeks to avoid because
25 the Planet record is not as complete as this one.

1 So there's a strategic -- at least our view is
2 there is a strategic reason for the continued request for
3 stay after stay after stay having less to do with cost and
4 more to do with we prefer that Planet be decided by itself
5 without being informed by other cases that are relevant.

6 THE COURT: Oh, what about that?

7 MR. AMBERG: Believe me, it's about cost. It's --
8 this is -- this has been phenomenally expensive. We have
9 submitted sworn statements from CNS's chief executive and
10 owner to that effect. So this is very much about looking out
11 for the pocketbook of my client.

12 I really thought Mr. Naeve was going in the same
13 direction when he was --

14 THE COURT: I thought so too, which is why I asked.
15 Go ahead.

16 MR. AMBERG: Well, I thought, you know, he was
17 going to make my argument for me when he stood up and asked
18 the Court well, what are the issues? What are the evidence
19 for trial? That's the -- that's the problem that, frankly,
20 we're having. This is a big decision -- big tentative
21 decision. It's complicated. It's detailed. You know, it
22 just puts a further burden on the ability of my client to
23 meet the current schedule.

24 THE COURT: Okay. Well said by both.

25 MR. AMBERG: Thank you.

1 THE COURT: Thank you for your presence here. It
2 is under submission, including that, but that's not good,
3 because you've got St. Joseph's Day hanging over your head.

4 All right. I'm going to do this in deference to
5 your life. I'm not sure how long I'm going to have this
6 tentative under submission. You need to know right away. So
7 I will think about your request and let you know right away
8 so you won't find out on the Ides of March --

9 MR. AMBERG: Thank you.

10 THE COURT: -- that your St. Joseph's Day deadline
11 is still with us. You'll find that out in the next day or
12 two.

13 MR. AMBERG: I appreciate that.

14 MR. NAEVE: Thank you, Your Honor.

15 (Proceedings concluded at 11:06 a.m.)

16 CERTIFICATE

17 I HEREBY CERTIFY THAT THE FOREGOING IS A TRUE AND CORRECT
18 TRANSCRIPT OF THE STENOGRAPHICALLY RECORDED PROCEEDINGS IN
19 THE ABOVE MATTER.

20 FEES CHARGED FOR THIS TRANSCRIPT, LESS ANY CIRCUIT FEE
21 REDUCTION AND/OR DEPOSIT, ARE IN CONFORMANCE WITH THE
22 REGULATIONS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES.

23

24 /s/ Miriam V. Baird

03/02/2018

25 MIRIAM V. BAIRD
OFFICIAL REPORTER

DATE